IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

YETI COOLERS, LLC, Plaintiff v. **RTIC COOLERS, LLC,** **JOHN JACOBSEN, AND** **JAMES JACOBSEN,** Defendants	**Case No. 1:15-cv-00597-RP** **The Hon. Robert L. Pitman** **Special Master Karl Bayer** **Jury Trial Demanded**

DEFENDANTS' MOTION IN LIMINE TO EXCLUDE
YETI'S PURPORTED EVIDENCE OF ACTUAL CONFUSION

INTRODUCTION

Defendants RTIC Coolers, LLC ("RTIC"), John Jacobsen, and James Jacobsen ("Defendants") submit the following motion in limine, and respectfully request the Court to enter an order that counsel for Plaintiff YETI Coolers, LLC ("YETI") and any and all witnesses called on behalf of YETI be instructed to refrain at trial from any statement, comment, question, or interrogation, directly or indirectly, in any manner whatsoever, including the offering of documentary evidence, concerning the matters set forth herein, without first approaching the Court in advance and securing a further ruling regarding such matters.

MOTION IN LIMINE

The Court should exclude YETI from offering evidence as to purported actual confusion that is based on unreliable secondhand accounts or out-of-court statements, and/or that is not relevant to the issue of actual confusion. For the Court's convenience, Defendants have attached as Appendix "A" a non-exhaustive list of the evidence they seek to exclude on these grounds. As explained below, much of YETI's evidence for actual confusion among consumers comes from unidentified and unreliable sources, including anonymous, unsourced comments on social media pages and internet blog sites, and in many cases comes through multiple layers of inadmissible hearsay. In addition, many of the statements offered by YETI are not relevant and not probative of actual confusion, because they consist merely of statements comparing the parties' products or discussing the relationship between the companies, or because they come from declarants who are not actual or potential consumers considering a purchase, or because they relate to products other than the coolers at issue in this case. *See Sno-Wizard Mfg., Inc. v. Eisemann Products Co.*, 791 F.2d 423, 429 (5th Cir. 1986) ("“[N]ot all evidence proffered to show actual confusion will be deemed in fact to show such confusion.").

I. Unreliable hearsay statements should be excluded.

Courts rigorously scrutinize evidence of "confusion" based on secondhand accounts of purported out-of-court statements. *See, e.g.*, *Smith Fiberglass Prods. v. Ameron, Inc.*, 7 F.3d 1327, 1330–31 (7th Cir. 1993) (district court properly excluded third-party comments as unreliable hearsay where plaintiff could not identify the person making the statement and provided only a paraphrase of what was said). Because the declarants are not available for cross examination, the admission of such evidence should be strictly limited to in-court testimony providing firsthand accounts of out-of-court statements that clearly and unambiguously demonstrate the existence of trademark-relevant confusion. However, much of YETI's purported confusion evidence fails to meet this threshold of reliability.

A. Unreliable online comments and blog postings by unidentified declarants.

Evidence regarding statements by unidentified declarants – particularly on online social media and internet blog sites – should be excluded on both hearsay and reliability grounds. YETI and its experts rely heavily on anonymous online comments as evidence for purported "confusion" among consumers. *See, e.g.*, Ex. 1, [redacted]; Ex. 2, [redacted]; Ex. 3, Wind Dep. 289:1–14 (admitting he has no information about the people who made the comments); Ex. 4, [redacted]; *cf.* Ex. 5, Will Morgan 30(b)(6) deposition at 354:11–367:14 (admitting he has no idea who these commenters were and that he does not know whether YETI contends their comments show actual confusion).

Without the opportunity to identify – let alone cross-examine – the speaker, there is no way to understand the context of the statement, confirm that the speaker was in fact confused, or verify that it was in fact made by an actual or prospective purchaser considering a purchase. *See Smith*, 7 F.3d at 1330–31 (district court properly excluded third-party comments as unreliable hearsay where plaintiff could not identify the person making the statement and provided only a paraphrase of what was said); *Versa Prods. Co. v. Bifold Co.,* 50 F.3d 189, 212 (3d Cir. 1995) (testimony regarding confusion at trade shows by unidentified people was excluded as hearsay). YETI's own expert Isabella Cunningham testified that she did not consider "unsubstantiated and uncorroborated" hearsay statements to be evidence of actual confusion, especially when the identity of the speaker is unknown. Ex. 6, Cunningham Dep. 363:7–367:4, 368:5–370:17, 371:2–372:21; Ex. 7, Cunningham Dep. Exhibit 15 (discussing expert report she had given for the defendant in a different trademark case in which she concluded that the plaintiff's evidence failed to show actual confusion).

Courts have been particularly skeptical of online comments posted on social media websites and internet blogs, repeatedly rejecting such evidence as lacking sufficient indicia of reliability. *See, e.g.*, *QVC Inc. v. Your Vitamins Inc.*, 439 F. App'x 165, 168–69 (3d Cir. 2011) ("Comments left on blog posts can be very difficult to authenticate. The use of false identities in Internet forums is now a well-known tactic for attacking corporate rivals."); *Blue Bell Creameries, L.P. v. Denali Co.*, Civ. No. H-08-0981, 2008 WL 2965655, at *5 (S.D. Tex. July 31, 2008) ("Nothing is known about the persons who made the [blog] entries, about whether they are related in any way to either party or whether they are describing true events and impressions."); *Echo Drain v. Newsted*, 307 F. Supp. 2d 1116, 1126 (C.D. Cal. 2003) ("unauthenticated e-mails and webpostings" are "not sufficient evidence of actual confusion").

B. Multiple levels of hearsay.

Even if out-of-court statements by purportedly confused consumers are admissible as non-hearsay or as state-of-mind declarations, many of YETI's examples are still inadmissible because the statements are recounted through multiple levels of inadmissible hearsay. In particular, the testimony of YETI's National Sales Manager and 30(b)(6) designee Will Morgan on the subject of customer confusion should be excluded as inadmissible double hearsay because Mr. Morgan's testimony consisted almost exclusively of recounting what ***other*** YETI employees had told him about their interactions with customers. *See* Ex. 5, Morgan Dep. at 23:16–27:5, 322:6–324:17, 325:4–16 (admitting he was not "personally a party" to any of these conversations). *See also, e.g.*, Ex. 8, RTIC0018832 (customer says in e-mail that he took his RTIC cooler to an open house and "everyone thought it was a YETI"); Ex. 9, RTIC0100637 (customer says in chat log that "people at buccees" told him RTIC owns YETI); Ex. 10, RTIC0069932 (customer says in chat log that "Everyone I've shown [my RTIC cooler] to thinks it's a yeti."); Ex. 15, Ashly Cartwright Dep. 250:6–22 (describing conversations with customers who told her they showed their RTIC coolers to other people who thought they were YETIs). *See* Fed. R. Evid. 805; *Versa Prods. Co. v. Bifold Co.*, 50 F.3d 189 (3d Cir. 1995) (testimony by plaintiff's official about statements by another employee recounting statements by other people at trade shows was not admissible); *Copy Cop, Inc. v. Task Printing, Inc.*, 908 F. Supp. 37, 41–42 (D. Mass. 1995) (excluding hearsay statements by plaintiff's president about "two consumer queries to store employees indicating confusion"); *Ocean Bio-Chem, Inc. v. Turner Network Television, Inc.*, 741 F. Supp. 1546, 1559 (S.D. Fla. 1990) (excluding out-of-court statements recounting others' out-of-court statements because "[s]uch double hearsay is not admissible under the state of mind exception").

II. Statements not relevant to actual confusion should be excluded.

YETI's evidence should also be excluded as irrelevant, insofar as it does not show confusion among actual or potential consumers who are considering making purchases of cooler products.

A. Statements that do not show confusion.

Much of YETI's purported confusion evidence consists of statements that merely mention RTIC and YETI together. Such statements are not probative of confusion. To the contrary, many such statements are comparative remarks which indicate the consumer is well aware that the RTIC and YETI coolers are two different products sold by two different companies. Merely mentioning the products as competing or alternative does not evidence confusion. *See Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 561 F. Supp.2d 368, 387 (S.D.N.Y. 2008) ("The very fact of calling to mind may indicate that the mind is distinguishing, rather than being confused by, two marks."). For example, statements that RTIC's cooler is just as good as, or better than, YETI's cooler (or statements to the contrary) show that the speaker is clearly aware the two coolers are separate and competing brands. Likewise, statements that RTIC's cooler "looks like a YETI," or accusations that RTIC "ripped off" or "copied" YETI or made a "knockoff" cooler, are not probative of confusion because they show the speaker's awareness that RTIC and YETI are competitors. *See, e.g.*, Ex. 1, [redacted]; Ex. 11, RTIC0101963 ("Is this a knockoff?); Ex. 12 (RTIC "stole yeti's designs"); Ex. 13, Heather Meyer Dep. 64:9–67:5 (customers told her that the coolers looked the same or that RTIC copied YETI's design). Courts have repeatedly held that confusion is not shown where consumers clearly understand that the parties are different companies. *See Fisher Stoves, Inc. v. All Nighter Stove Works, Inc.*, 626 F.2d 193, 195 (1st Cir. 1980) (evidence that consumers accused one party of copying the other and wanted to know which product was made first does not show actual confusion); *Little Souls, Inc. v. Les Petits,* 789 F. Supp. 56, 60 (D. Mass. 1992) (evidence that people at a trade show told plaintiff's salespeople that there was another booth offering dolls which looked like plaintiff's dolls fails to show that the people confused the parties' trademarks).

Furthermore, rumors or inquiries about a possible relationship between the two companies are not evidence of confusion, but instead show consumers' understanding that the parties and their respective products are different. *See, e.g.*, Ex. 1, [redacted]; Ex. 14, RTIC0018923 (e-mail asking if RTIC and YETI had the same founders); Ex. 15, Ashly Cartwright Dep. 150:15–174:9; 305:24–306:2, 326:3–4 (discussing customer inquiries about same rumors); Ex. 16, Nicole Cebulak Dep. 262:17–264:7, 264:13–268:13, 301:4–5, 304:23–24, 315:3–5, 316:18–20, 322:7–20 (same); Ex. 17, Adam Stanford Dep.248:24–251:11, 253:6–254:10 (same); Ex. 18, Lisa Begnaud Dep. 243:13–244:8, 246:23–247:10, 297:4–298:19 (same); Ex. 19, Brandi Wells Dep. 18:15–20:8, 86:5–12 (same). *See Nora Beverages, Inc. v. Perrier Group, Inc*., 269 F.3d 114, 124 (2d Cir. 2001) ("Inquiries about the relationship between an owner of a mark and an alleged infringer do not amount to actual confusion. Indeed, such inquiries are arguably premised upon a lack of confusion between the products such as to inspire the inquiry itself."); *Int'l Ass'n of Machinists & Aero. Workers v. Winship Green Nursing Ctr.,* 103 F.3d 196, 205 (1st Cir. 1996) (inquiries reveal doubt as to connection or affiliation, and do not on their face show actual confusion); *Lloyd's Food Prods, Inc. v. Eli's Inc.*, 987 F.2d 766, 768 (Fed. Cir. 1993) (evidence that people "wondered" about a possible relationship between the parties does not show confusion); *Toys "R" Us v. Lamps R Us*, 219 U.S.P.Q. 340, 346 (TTAB 1983) ("The fact that questions have been raised as to the possible relationship between firms is not by itself evidence of actual confusion of their marks."); *Fisher Stoves*, 626 F.2d at 195 (questions asking if two companies are affiliated, or asking about differences in their products, do not show actionable confusion because they "indicate that these customers, at least, had the difference in source clearly in mind"); 3 MCCARTHY ON TRADEMARKS § 23:16 ("[A] question as to possible affiliation reveals that the questioner had the difference in mind or else would not have bothered even to enquire.").

B. Statements not made by actual or potential consumers in the context of a purchasing decision.

In addition to being reliable, to be relevant on the issue of confusion, YETI's evidence must show confusion among ***consumers making purchasing decisions in the marketplace***. Many of YETI's purported examples of such confusion either are not from consumers considering a purchase, or come with insufficient contextual information to determine whether they are. *See, e.g.*, Ex. 12, YETI_RTIC0825678 and RTIC00058603 (comments on RTIC social media page with no indication of who posted them); Ex. 20, RTIC0097953 (same); Ex. 21, RTIC0181507 (e-mail asking about companies' possible affiliation with no indication why sender wants to know); Ex. 22, RTIC0106684 (same); Ex. 23, RTIC0116327 (chat log participant asks "Are the Rtic products protected by a design patent?" and won't say why he wants to know). *See Alta Vista Corp. v. Digital Equip. Corp.*, 44 F. Supp. 2d 72, 79 (D. Mass. 1998) ("[T]he relevant confusion is that which affects the purchasing and selling of the goods or services in question."). Courts have rejected "confusion" evidence consisting of comments from employees or retailers, family, or friends, or comments made in non-commercial settings. *See, e.g.*, *Packman v. Chicago Tribune Co.*, 267 F.3d 628, 645 (7th Cir. 2001) (rejecting out-of-court statements because plaintiff did not show speakers had purchased or attempted to purchase the product, and thus they were not relevant "consumers" under the Lanham Act); *Walter v. Mattel Inc.*, 210 F.3d 1108, 1111 (9th Cir. 2000) ("attestations from persons in close association and intimate contact with [the senior user] do not reflect the views of the purchasing public"); *Freedom S&L Ass'n v. Way*, 757 F.2d 1176, 1185 (11th Cir. 1985) (trial court properly discounted testimony about "friends" who were not identified as potential customers); *Windsor, Inc. v. Intravco Travel Ctrs.*, 799 F. Supp. 1513, 1525 (S.D.N.Y. 1992) (statement was not probative where "it involved confusion of another supplier within the travel industry rather than of a consumer who purchases the services in question"); *Inc. Publ'g Corp. v. Manhattan Magazine, Inc.*, 616 F. Supp. 370, 389–90 (S.D.N.Y. 1985), *aff'd* 788 F.2d 3 (2d Cir. 1986) (statements were not made by "consumers actually contemplating placing an ad or subscribing to or purchasing the magazine" and thus were not probative); *cf. Jonbil v. Int'l Multifoods*, 3 U.S.P.Q.2d 1882, 1886 (TTAB 1987) (testimony was "insufficient to demonstrate actual confusion by potential purchasers of the respective goods in the commercial marketplace" where witnesses "were not truck drivers, who are the ordinary purchasers of both opposer's products and of applicant's products").

C. Statements that do not specifically refer to coolers.

Consumer statements that do not specifically refer to the cooler products at issue in this case are irrelevant and should be excluded. Statements that refer to RTIC and YETI's tumblers and drinkware should be excluded because the tumblers are not at issue in this lawsuit. *See, e.g.*, Ex. 14, RTIC0018923 (question about companies' affiliation from customer seeking to purchase tumblers); Ex. 24, RTIC0018908 (e-mail from customer asking about "YETI tumblers"); Ex. 9, RTIC0100637 (customer asking if RTIC owns YETI says "I like y'alls cups better anyway"). Likewise, because YETI must prove a likelihood of confusion specifically with regard to its cooler design, rather than its name or its overall brand, general statements about the RTIC and YETI companies or brand names should be excluded where it is not clear that the speaker is referring specifically to coolers. *See, e.g.*, Ex. 20, RTIC0097953 (numerous online comments about similarity and companies' affiliation posted under YouTube video promoting RTIC tumblers).

CONCLUSION

The Court should grant RTIC's motion in limine and preclude YETI from offering any evidence (including but not limited to the evidence identified in Appendix A hereto) or any argument at trial regarding the matters set forth above.

Dated: January 25, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2017, I electronically filed the foregoing using the CM/ECF system which will send notification of such filing to all counsel of record who have registered with this Court's ECF system, and via first class mail to those counsel who have not registered with ECF.

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